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NO. 82-403

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

COUGAR BUSINESS OWNERS ASSOCIATION, et al.,

Petitioners,

v.

STATE OF WASHINGTON; DIXIE LEE RAY, Governor; JOHN DOE ONE and JOHN DOE TWO,

Respondents.

On Certiorari from the Supreme Court

of the State of Washington

PETITITON FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Has a state governor exceeded her authority and wrongfully confiscated private property by declaring a state of emergency and restricting property use, prior to any property destruction, and by failing to terminate such restrictions after order is restored, even though such destruction and termination of emergency are required by statute.

2. Has a person been deprived of property without due process when a governor's emergency declaration, that restricts use of private property, is held by the state supreme court to be totally discretionary and immune from review in a tort action, and which declaration is held unimpeachable by the emergency statute.

IDENTIFICATION OF PETITIONERS

COUGAR BUSINESS OWNERS ASSOCIATION, consisting of DONALD P. and MARILYN J. PLATT, husband and wife, and EARL and G. BARCUS, husband and wife, d/b/a LONE FIR RESORT; RONALD and ANNETTE L. KATZER, husband and wife, d/b/a A & R GROCERY; EUGENE H. and DAWN MORTINSEN, husband and wife, d/b/a THE WILDWOOD INN AND CAFE; JOHN E. and D. KELLEY, husband and wife, d/b/a KELLEY'S REPAIR & WELDING; DAVID R. and LAURAL FISHER, husband and wife, d/b/a ARIEL STORE & TAVERN; ELVIN H. and DOROTHA L. ELMIRE, husband and wife, and LOIS LIVINGSTON, d/b/a THE COUGAR STORE; RPM CONSTRUCTION, INC., d/b/a COUGAR UNION SERVICE STATION; and JAMES V. and NEOMI GIPE, husband and wife.

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OFFICIAL OPINION

The reported opinion by the Washington State Supreme Court in the instant case can be found at 97 Wash. 2d 466, ____ P.2d ____ (1982). (See Appendix A.)

GROUNDS OF JURISDICTION

The judgment which is sought to be reviewed is that of the Washington State Supreme Court which was filed on June 10, 1982. The jurisdiction of this Court to review the decision of the Washington State Supreme Court is conferred by 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. U.S. Const. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Const. amend. XIV, § 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Wash. Const. art. 1, § 3.

Personal Rights. No person shall be deprived of life, liberty, or property, without due process of law.

4. Wash. Const. art. 1, § 16.

Eminent Domain. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any

corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into the court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

5. Wash. Rev. Code § 43.06.010(12)

General powers and duties.

In addition to those prescribed by the Constitution, the governor may exercise the powers and perform the duties prescribed in this and the following sections:

. . . .

(12) The governor may, after finding that a public disorder, disaster, energy emergency, or riot exists within this state or any part thereof which affects life, health, property, or the public peace, proclaim a state of emergency in

the area affected, and the powers granted the governor during a state of emergency shall be effective only within the area described in the proclamation;

6. Wash. Rev. Code § 43.06.200 **Definitions.**

Unless a different meaning is plainly required by the context, the following words and phrases as hereinafter used in RCW 43.06.010, and 43.06.200 through 43.06.270 each as now or hereafter amended shall have the following meaning:

"State of emergency" means an emergency proclaimed as such by the governor pursuant to RCW 43.06.010 as now or hereafter amended.

7. Wash. Rev. Code § 43.06.210 **Proclamation of state of emergency-- Termination.**

The proclamation of a state of emergency and other proclamations or orders issued by the governor pursuant to RCW 43.06.010, and 43.06.200 through 43.06.270 as now or hereafter amended shall be in writing and shall be signed by the governor and shall then be filed with the secretary of state. The governor shall give as much public notice as practical through the

news media of the issuance of proclamations or orders pursuant to RCW 43.06.010, and 43.06.200 through 43.06.270 as now or hereafter amended. The state of emergency shall cease to exist upon the issuance of a proclamation of the governor declaring its termination: Provided, That the governor must terminate said state of emergency proclamation when order has been restored in the area affected.

8. Wash. Rev. Code § 38.52.010(7)

Definitions.

As used in this chapter:

. . . .

(7) "Disaster" as used in this chapter shall mean events, arising out of either enemy attack, sabotage, or other hostile action, or natural causes, which reach such a dimension or degree of destructiveness as to warrant the governor declaring a state of emergency pursuant to RCW 43.06.010.

9. Wash. Rev. Code § 38.08.060

Governor's decision final.

Whenever any portion of the militia is ordered to duty by the governor, the decision of the governor shall be final,

incontrovertible, and unimpeachable.

10. Wash. Rev. Code § 38.08.040

Governor may order out organized militia.

In event of war, insurrection, rebellion, invasion, tumult, riot, mob or body of men acting together by force with intent to commit a felony or to offer violence to persons or property, or by force and violence to break and resist the laws of this state, or the United States, or in case of the imminent danger of the occurrence of any of said events, or whenever responsible civil authorities shall, for any reason, fail to preserve law and order, or protect life or property, or the governor believes that such failure is imminent, or in event of public disaster, the governor shall have power to order the organized militia of Washington, or any part thereof, into active service of the state to execute the laws, and to perform such duty as he shall deem proper.

11. Wash. Rev. Code § 4.92.090

Tortious conduct of state--Liability for damages.

The state of Washington, whether acting in its governmental or proprietary

> capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

STATEMENT OF THE CASE

On March 3, 1980, the governor of the state of Washington declared a state of emergency pursuant to Wash. Rev. Code § 43.06.210 and Wash. Rev. Code § 38.08.040, due to the reactivation of the volcano, Mt. St. Helens. This declaration was made prior to any destruction of property from volcano activity. On April 30, 1980, again prior to any damage from the volcano's reactivation, the governor, by Executive Order No. 80-05, created two restricted zones around the mountain. Petitioners' home town was placed in the "red" zone. Access to the areas was restricted to official government, law enforcement, scientific, and search and rescue activity. On May 18, 1980, Mt. St.

Helens erupted, causing property damage and loss of life. On May 25, 1980, the governor, by executive order, extended the red zone and restricted access to the areas to those mentioned above, plus the news media, individual property owners, persons with businesses within the zone, and others by special permit. Eruptions continued throughout the summer causing no further loss of life, nor significant property damage. On October 1, 1980, the town of Cougar was removed from the red zone by a governor's executive order, but the emergency order was not terminated.

The Petitioners brought suit against the State of Washington, Governor Ray, and two unnamed individuals based upon Governor Ray's declaration of emergency on April 3, 1980. The Petitioners sought damages based on the governor declaring the emergency too soon, for her including Cougar in the restricted zone, and for

her failing to remove the restricted zone soon enough. Petitioners alleged that the governor's power to declare an emergency was limited to specifically definable events. However, the Cowlitz County Superior Court granted a summary judgment in favor of the Respondent, and the Washington State Supreme Court affirmed, reasoning that a governor's declaration of emergency is totally discretionary and therefore precludes any state liability under Wash. Rev. Code § 4.92.090. [Appendix A at A-14--A-15.]

ARGUMENT AND REASONS FOR GRANTING THE WRIT

This case presents important federal and state constitutional issues which must be decided since 48 other states have emergency legislation similar to Washington. [See Appendix B.]

Petitioners assert that the Washington State governor lacked the

power to declare an emergency prior to May 18, 1980, under either Wash. Rev. Code § 43.06 or Wash. Rev. Code § 38.52, and that the Washington Supreme Court erred in holding that the determination of the existence of an emergency is a wholly discretionary decision by the governor. The argument is based on:

1. That the state's exercise of its emergency police power must be reasonable and meet constitutional safeguards.

2. That the emergency statute defining "disaster" limits a governor's discretionary power to declare a state of emergency only when such an event occurs.

3. That a governor's uninhibited exercise of emergency police power exceeds the constitutional safeguards.

4. A governor's decision exceeding her authority creates liability on the part of the state.

A. State Police Power

It is a general rule that a state may use its police power to reasonably regulate property use to protect public safety and welfare. Nebbia v. New York, 291 U.S. 502 (1934). However, a state cannot use its police power to arbitrarily invade property rights, Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928), and must exercise its power within state and federal constitutional limitations applicable to all governmental action. Day-Bright Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), reh'g denied, 343 U.S. 921 (1952).

None of the 49 states with emergency legislation specifically define "emergency" within their statute. [See Appendix B.] Generally, the decision regarding the existence of an emergency situation is left to the discretion of

the governor and/or state legislature, with such decision being reviewable by the Court. Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398 (1933); State ex rel. Satterthwaite v. Hinkle, 152 Wash. 221, 227 P. 837 (1929). All principles regarding a state legislature's exercise of its police power apply to decisions of state governors. Inman v. Sandwig, 170 Wash. 112, 15 P.2d 696 (1932).

B. State Statute Defining Disaster Limits Governor's Ability to Declare Emergency

None of the 49 different emergency statutes define "emergency." [See Appendix B.] Washington's general power statute merely defines "state of emergency" as an "emergency proclaimed as such by the governor pursuant to RCW 43.06.010 as now or hereafter amended." Wash. Rev. Code § 43.06.200. However, Washington is unique in that its specific Emergency Service Statute, Wash. Rev.

Code § 38.52, which Governor Ray invoked to restrict the use of Petitioners' property, defines disaster to mean "events arising out of either enemy attack, sabotage, or other hostile action, or natural causes, which reach such a dimension or degree of destructiveness as to warrant the governor declaring a state of emergency pursuant to RCW 43.06.010." Wash. Rev. Code § 38.52.010(7). Therefore, by statute itself, the governor was unable to declare an emergency absent some property destruction or loss of human life. Her declaration of emergency prior to any such events in anticipation of an assumed future disaster exceeded her authority granted by the state legislature. The Washington Supreme Court, however, ignores the definitional section under Wash. Rev. Code § 38.52 and justifies its decision on the statute's

broad-stated policy and sympathetic approval of the governor's action. [See Appendix A at A-13, A-14.] The governor's action, however, was an improper exercise of police power and violated Petitioners' due process rights protected by federal and state constitutions. Nashville, C. & St. L. Railway v. Walters, 294 U.S. 405 (1935); Grenada Lumber Co. v. Mississippi, 217 U.S. 433 (1910); [See, U.S. Const. amend. V; U. S. Const. amend. XIV; Wash. Const. art 1, § 3; Wash. Const. art. 1, § 16], and such exercise resulted in an arbitrary and unreasonable interference with personal rights under the guise of police power; Meyer v. Nebraska, 262 U.S. 390 (1923).

C. A Governor's Uninhibited Exercise of Police Power Exceeds Constitutional Safeguards

The Washington Supreme Court

interprets the state's emergency power statute as giving the governor unbridled power to declare an emergency based on a presumed future disaster and regardless of whether an actual disaster exists. [See Appendix A at pages A-10--A-14.] They justify their decision under the state's broad police power. [See Appendix A at A-14] However, police powers cannot be invoked as universal remedies nor arbitrarily interfere with rights guaranteed by the constitution. Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A.L.R. 1455 (1925); Otis v. Parker, 187 U.S. 607 (1902); State ex rel. Webster v. Superior Court of King County, 67 Wash. 37, 120 P. 861 (1912); Karasek v. Peier, 22 Wash. 419, 61 P. 33 (1900).

The Washington court failed to address the issue of whether a disaster existed when the emergency power was

invoked [See Appendix A at A-13--A-14], even though the emergency power used depends on existence of a disaster to bring it into operation. Wash. Rev. Code § 43.06.010(12) states:

> The governor may, after finding that a public disorder, disaster, energy emergency, or riot exists within the state or any part thereof which affects life, health, property, or the public peace, proclaim a state of emergency in the area affected, and the powers granted the governor during a state of emergency shall be effective only within the area described in the proclamation.

Additionally, the court ignored the definitional section under Wash. Rev. Code § 38.52, which defines a disaster to include "natural causes which reach such a dimension or degree of destructiveness as to warrant the governor's declaring a state of emergency pursuant to RCW 43.06.210." Wash. Rev. Code § 38.52.010(7). [See Appendix A at A-13--A-14.] This section clearly requires

some property destruction before an emergency exists to justify the governor invoking emergency legislation. The court's affirmation of the governor's action expanded the governor's power beyond that granted by the state legislature and, in effect, allows the state's governor, under color of emergency police power, to arbitrarily restrict a person's use and enjoyment of his property, without ability to be compensated for an abuse of discretion, and therefore in violation of a person's constitutional rights. See, Dobbins v. Los Angeles, 195 U.S. 223 (1904); Lawton v. Steele, 152 U.S. 133 (1894); Re Aubrey, 36 Wash. 308, 78 P. 90 (1904); [See, U.S. Const. amend. V; U.S. Const. amend. XIV; Wash. Const. art. 1, §3; Wash. Const. art. 1, §16]. This is true since the governor's decision, according to the Washington Supreme Court and Wash.

Rev. Code § 38.52, is immune from an action in tort. [See Appendix A at A-14--A-15.]

The court effectively denies citizens the right to have the governor's action reviewed at all. The court exempts the governor's action from review in a tort action, but states that a mandamus proceeding could be maintained by property owners as a means to challenge the governor's actions. However, such a proceeding, like a tort action, under the court's reasoning, would run into the bar of Wash. Rev. Code § 38.08.060, which states: "Whenever any portion of the militia is ordered to duty by the governor, the decision of the governor shall be final, incontrovertible, and unimpeachable." [See Appendix A at A-12.] Such a rule not only violates a person's due process rights protected by both federal and state

constitutions [See, U.S. Const. amend. XIV; Wash. Const. art. 1, §3], but also conflicts with the many cases holding that the final determination of the existence of an emergency is left to the courts. Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 (1933).

Additionally, the Washington Supreme Court summarily dismisses the issue that the governor was required to terminate the state of emergency when order in the area was restored. [See Appendix A at A-14.] Again, such a decision, like a decision to declare an emergency, is not totally discretionary under Washington's statute, see Wash. Rev. Code § 43.06.210, but is tied to objective factors regarding the continued destruction from a previous disaster. The governor's failure to terminate the emergency and remove Petitioners' property from the restricted zones, shortly after damage

from the May 18th eruption subsided, by early June, constitutes an abuse of power by the governor. The retention of Petitioners' property in the restricted zones until October, well after the "emergency" ended, constituted an unreasonable deprivation of Petitioners' property. Such wrongful deprivation without just compensation or possible judicial review due to the tort immunity, plus statutory prohibition against suits to challenge the governor's decisions, violated Petitioners' due process rights guaranteed by both federal and state constitutions.

D. Governor's Liability for Exceeding her Authority

The Washington Supreme Court absolved the governor from any liability under Wash. Rev. Code § 4.92.090, stating that discretionary governmental decisions are immune from tort liability, and

additionally cited Wash. Rev. Code § 38.08.060, which provides in part that a governor's decision under that statute is unimpeachable. [See Appendix A at A-12.]

However, as noted above, declaration of a state of emergency and its termination are not wholly discretionary, but involve specifically definable events.

Also, as shown above, the governor's actions exceeded her authority and therefore should make her liable for damages suffered by Petitioners' loss of the use of their property.

In summary:

1. Exercise of emergency police powers by a state governor must be reasonable.

2. The governor's unlimited ability to declare an emergency without specific guidelines as to what is an

emergency, and without judicial review, allowed the governor to arbitrarily restrict the use of Petitioners' property in violation of state and federal protected constitutional rights.

3. Additionally, the governor exceeded her authority under Wash. Rev. Code § 38.52 by declaring the state of emergency before any disaster occurred.

4. Such abuse of power is amendable to a tort action under Wash. Rev. Code § 4.92.090.

Respectfully submitted,

Barry J. Dahl

BARRY J. DAHL
Of Attorneys for Petitioners

APPENDIX A

[No. 47885-6. En Banc. June 10, 1982.]

COUGAR BUSINESS OWNERS ASSOCIATION, ET AL, Appellants, v. THE STATE OF WASHINGTON, ET AL, Respondents.

DIMMICK, J.--Appellants, members of an association of business owners in the town of Cougar, brought this suit against the State of Washington, Governor Ray and two unnamed individuals based upon the state of emergency declared in April 1980 due to the volcanic activity of Mount St. Helens. Appellants allege damages caused by the Governor's declaring the emergency too soon, including Cougar in the restricted "red zone", and failing to remove Cougar from that zone soon enough. The trial court granted respondents' motion for summary judgment dismissing appellants' complaint. We affirm.

The issue is whether appellants' damage suit is a proper mode to assail the respondents' actions in declaring a state of emergency and imposing restrictions. We conclude that respondents' actions were discretionary and lawful and not subject to a collateral attack by a suit for damages brought months after the questioned efforts were made.

The town of Cougar is located near the north end of Yale Lake, approximately 11 miles southwest of Mount St. Helens. In March 1980, a series of earthquakes occurred under the mountain. The following relevant events then took place:

Mar. 27 Mountain erupted spewing steam and ash with intermittent eruptions through April and May.

Apr. 3 Declaration by the Governor. Declared an emergency in the state pursuant to RCW 43.06.210 and 38.08.040 caused by the volcanic activity of Mount St. Helens.

Apr. 30 Executive Order 80-05. Created two restricted zones around the mountain informally known as the red and blue zones to which access was restricted to official government, law enforcement, scientific, search and rescue activity.

May 18 Major eruption causing substantial destruction and loss of human life.

May 25 Executive Order 80-08. Amended previous order extending the red zone from the center of Mount St. Helens to a radius of 20 miles surrounding the mountain and restricting access to government, scientific, law enforcement, search and rescue activities, the news media, and individual property owners and persons with business within the zone and others by special permit.

May 25 Eruption of steam, ash, pyroclastic flow, pumice and mud flows.

June 2 — Executive Order 80-09. Amended Executive Order 80-08 by defining exact boundaries of the red zone and further clarifying the access through permit process requiring those who were exempted from the access restrictions to obtain permits. Persons owning property and having legitimate business reasons for being within the red zone were allowed admission upon obtaining an identification permit.

June 12, July 22 — Eruption of steam, ash, pyroclastic flow, pumice and mud flows.

July 29 — Executive Order 80-11. Amended Executive Order 80-09 by moving the red zone slightly northward on the south side of the mountain to allow access of the public to the Lake Merwin area and the communities of Yale, Aerial and Woodland Park. Other minor adjustments were made to the boundary (not relevant herein).

Aug. 7, Aug. 15 — Eruptions of steam, ash, pyroclastic flow, pumice and mud flows.

Sept. 3 — Cougar hearing panel appointed. Governor appointed Cougar hearing panel to conduct a public hearing on the question of whether the Cougar area and

a corridor leading to it should be removed from the red zone.

Sept. 11 Public hearing. The Cougar hearing panel conducted public hearing at the Yale school and subsequently recommended that the area of Cougar and the corridor leading to it be removed from the red zone.

Oct. 1 Executive Order 80-15. Removed Cougar and its primary access route from the red zone.

Throughout this period the Governor consulted with several scientific experts including Dr. Dwight R. Crandell, a geologist for the United States Geological Service. She established a Mount St. Helens watch group composed of directors of Agriculture, Ecology, Office of Financial Management, State Patrol, Transportation, Social and Health Services, Emergency Services, and the National Guard. The group was created to keep the Governor informed and to assist in developing plans to meet the needs of the situation.

The Governor filed an affidavit with the trial court stating that the unpredictable nature of the volcano created a statewide threat to life and property when she issued the declaration of emergency in April. Upon the advice of experts she imposed the restricted zones. The eruption on May 18 was greater than predictions had indicated. The Governor subsequently determined that it was necessary to extend the restricted areas due to the increased danger. She took such action because her information

indicated that it was unknown whether subsequent explosive eruptions of equivalent or greater magnitude than the eruption on May 18 would occur. There was a distinct possibility that a pyroclastic flow from such a blast could reach the Cougar area. The Governor expressly stated:

> As the summer progressed I was aware of the concern of some elements of the business people in Cougar that the restricted entry to their area was depressing their economy. I was also being advised of the continuing hazard to the Cougar area that the mountain posed. In making my judgments I weighed opinions both for and against opening access to Cougar.
>
> . . .
>
> In each of these decisions affecting the Town of Cougar and its residents I weighed the advice of federal, state and local officials as well as the scientific community and made my decision exercising my best judgment based on the then current state of information and opinion. I acted at all times out of regard for what in my considered judgment was necessary to preserve and maintain life, health, property and the public peace. I acted at all times in good faith and without malice toward any person. Throughout this period of time it was my firm belief that the Mt. St.

> Helens disaster created the need for a continuing state of emergency necessitating in certain areas of this state at certain times restrictions on access such as those imposed by me on the Cougar Area.

On October 31 appellants filed the instant action alleging the State's actions were tortious and constituted a taking of property without compensation in violation of the federal and state constitutions. Furthermore, they allege they were entitled to damages under 42 U.S.C. §1983. We conclude that Governor Ray's actions were authorized by statute and were entirely discretionary. Accordingly, appellants' tort claims must fail. In addition, her actions were proper exercises of her police power and thus did not constitute a taking of property without just compensation. The Governor, under these circumstances, is not liable under 42 U.S.C. §1983. Our holding does not leave the residents of this state without redress in similar situations. Appellants may have challenged the actions by using an extraordinary writ at an earlier stage. They chose, however, to wait and when subsequent eruptions of the magnitude of the May 18 eruption did not recur, decided to seek recovery for damages.

[1] Appellants contend that respondents' actions in including Cougar in the restricted zone and not removing it soon enough constituted a nuisance, a trespass, and an intentional interference with business expectancies. These allegations were brought pursuant to RCW 4.92.090, which provides that the State

is liable for tortious conduct to the same extent as private individuals. In interpreting that statute we held that truly discretionary governmental acts on an executive level could not be characterized as tortious and thus could not be cognizable under the statute. Evangelical United Brethern Church v. State, 67 Wn.2d 246, 253-55, 407 P.2d 440 (1965). We set forth a 4-part test for determining whether an action is truly discretionary:

> (1) Does the challenged act . . . necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act . . . essential to the realization or accomplishment of that policy, program, or objective . . .? (3) Does the act . . . require the exercise of basic policy evaluation, judgment, and expertise . . .? (4) Does the governmental agency involved possess the requisite constitutional, [or] statutory . . . authority . . . to do or make the challenged act . . .?

Id., at 225. If all four questions can be clearly and unequivocally answered in the affirmative, then the act or decision can be classified as a discretionary governmental function and nontortious.

We subsequently reaffirmed Evangelical and refined the process of determining discretionary decisions by requiring that the State make a showing that a "policy decision, consciously balancing risks and advantages, took place." King v. Seattle, 84 Wn.2d 239, 246, 525 P.2d 228 (1974).

Criteria for characterizing an action as discretionary are met in the instant case. First, in an area affected by a natural disaster the preservation and maintenance of life, health, property and the public peace is a basic governmental policy. Second, in the case of a volcano, such as Mount St. Helens, the establishment of a restricted zone of entry around the mountain during a period of uncertain eruptions is essential to the realization and accomplishment of that policy. Third, the decision of whether a particular area or town should be included within the restricted access zone requires the exercise of basic policy evaluation, judgment and expertise. Fourth, the Governor possesses the requisite constitutional and statutory authority to restrict access to certain localities for the protection of the public. Finally, the Governor made a conscious decision to include the Town of Cougar within the area of the red zone because of her concern that it was exposed to danger from Mount St. Helens.

The only requisite factor appellants challenge as missing is the fourth factor in the Evangelical test. That is, appellants contend that the Governor lacked the constitutional and statutory authority to act as she did. We disagree.

The Constitution of the State of Washington imposes on the Governor the duty to see that the laws are faithfully executed. Const. art. 3, §5.

RCW 43.06.010 prescribes the general powers and duties of the Governor, including:

> (12) The governor may, after finding that a public disorder, disaster, energy emergency, or riot exists within this state or any part thereof which affects life, health, property, or the public peace, proclaim a state of emergency in the area affected, and the powers granted the governor during a state of emergency shall be effective only within the area described in the proclamation;

RCW 43.06.200 defines a "state of emergency" as an emergency proclaimed as such by the Governor pursuant to RCW 43.06.010. RCW 43.06.210 provides for the issuance of a proclamation of emergency and executive orders:

> The proclamation of a state of emergency and other proclamations or orders issued by the governor pursuant to RCW 43.06.010, and 43.06.200 through 43.06.270 as now or hereafter amended shall be in writing and shall be signed by the governor and shall then be filed with the secretary of state. The governor shall give as much public notice as practical through the news media of the issuance of proclamations or orders pursuant to RCW 43.06.010, and 43.06.200 through 43.06.270 as now or hereafter amended. The state of emergency shall cease to exist upon the issuance of a proclamation of the governor declaring its termination: Provided, That the governor must

terminate said state of emergency proclamation when order has been restored in the area affected.

RCW 43.06.220 sets forth the powers of the Governor after proclaiming a state of emergency and provides in pertinent part:

> The governor after proclaiming a state of emergency and prior to terminating such, may, in the area described by the proclamation issue an order prohibiting:
>
> . . .
>
> (8) The use of certain streets, highways or public ways by the public; and
>
> (9) Such other activities as he reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace.
>
> In imposing the restrictions provided for by RCW 43.06.010, and 43.06.200 through 43.06.270, the governor may impose them for such times, upon such conditions, with such exceptions and in such areas of this state he from time to time deems necessary.

Under the emergency services act, RCW 38.52, the Legislature has declared the following policy and purpose:

> (1) Because of the existing and increasing possibility of the occurrence of disasters of

> unprecedented size and destructiveness resulting from . . . natural causes, and in order to insure that preparations of this state will be adequate to deal with such disasters, to insure the administration of state and federal programs providing disaster relief to individuals, and further to insure adequate support for search and rescue operations, and generally to provide for the common defense and to protect the public peace, health, and safety, and to preserve the lives and property of the people of the state, it is hereby found and declared to be necessary:
>
> . . .
>
> (b) To confer upon the governor and upon the executive heads of the political subdivisions of the state the emergency powers provided herein;

RCW 38.52.020(1). The act goes on to define the Governor's general powers and duties, including:

> (3) In performing his duties under this chapter and to effect its policy and purpose, the governor is further authorized and empowered:
>
> (a) To make, amend, and rescind the necessary orders, rules, and regulations to carry out the provisions of this chapter within the limits of the

> authority conferred upon him herein. . .

RCW 38.52.050(3).

RCW 38.08 provides for the exercise of the Governor's military powers. RCW 38.08.040 provides in pertinent part that:

> [I]n event of public disaster, the governor shall have power to order the organized militia of Washington, or any part thereof, into active service of the state to execute the laws, and to perform such duty as he shall deem proper.

RCW 38.08.060 provides in pertinent part:

> Whenever any portion of the militia is ordered to duty by the governor, the decision of the governor shall be final, incontrovertible, and unimpeachable.

These statutory powers evidence a clear intent by the Legislature to delegate requisite police power to the Governor in times of emergency. The necessity for such delegation is readily apparent:

> In times of natural catastrophe or civil disorder, immediate and decisive action by some component of state government is essential. The legislative police power can of course be exercised to deal with crimes affecting the public health, safety, and welfare. In

> practice, however, the ravages of nature and the exigencies of rioting, labor strife, and civil rights emergencies usually necessitate prompt governmental response. Since the executive is inherently better able than the legislature to provide this immediate response, state chief executives have frequently been given substantial discretionary authority in the form of emergency powers to deal with anticipated crises. Consequently, when public emergencies arise, the center of governmental response is usually the governor's office.

(Footnote omitted.) Comment, Constitutional and Statutory Bases of Governors' Emergency Powers, 64 Mich. L. Rev. 290, 290 (1956).

Appellants concede that in the event of a disaster a Governor has the requisite emergency powers to take the actions Governor Ray took in response to the Mount St. Helens eruption. They contend a disaster is a specifically definable event causing harm or injury, that there was no such "disaster" until May 18, thus the proclamation of emergency prior to May 18 and the executive orders issued pursuant thereto were void.

[2,3] This definition of "disaster" is unduly narrow and restricts the legislative intent to empower the Governor to respond to emergencies. In this case the disaster was not only the eruption of May 18 but was in fact the

reactivation of a dormant volcano. If appellants' definition of "disaster" is accepted, only an actual pyroclastic eruption of the volcano constituted a disaster. The Governor's apparently broad emergency powers would be limited to clean-up operations. The Governor would have had no power to act before the actual eruption to save lives or property. In other words, nothing of a preventive nature could have been done. Such a contention is contrary to the legislative intent of the statutes upon which the Governor's actions were based.

Appellants also argue that the governor's actions were outside the purview of the statute due to that portion of RCW 43.06.210 which provides that the Governor "must terminate said state of emergency proclamation when order has been restored in the area affected." Appellants contend that order was restored in the area surrounding Cougar sometime in June and since the Governor did not remove Cougar from the restricted zone until October she violated the directive of RCW 43.06.210. The statute does not define what the phrase "when order has been restored" means. Logically, it means a time when the "public disorder, disaster, energy emergency, or riot" which led the Governor to declare the state of emergency no longer exists. The Governor's discretion is the same in determining both the start and end of such an occurrence. This is particularly true when the disaster is an active but not currently erupting volcano.

In summary, appellants brought this action pursuant to RCW 4.92.090. Under

that statute discretionary decisions are immune from liability. The proclamation of an emergency and the governor's issuance of executive orders restricting access to a particular locality are by statute committed to the sole discretion of the Governor and not amenable to review in a civil action for damages.

[4] Appellants also allege that the inclusion of Cougar within the restricted area and the continued restrictions of the area until October 1 constituted a taking without just compensation violative of the Fifth Amendment of the United States Constitution and article 1, section 16 of the Washington State Constitution. It is a well established principle that if a regulation is a valid exercise of the State's police powers, it does not constitute a taking. Goldblatt v. Hempstead, 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962); Mugler v. Kansas, 123 U.S. 623, 668-69, 31 L. Ed. 205, 8 S. Ct. 273 (1887); Rains v. Department of Fisheries, 89 Wn.2d 740, 575 P.2d 1057 (1978); Maple Leaf Investors, Inc. v. Department of Ecology, 88 Wn.2d 726, 565 P.2d 1162 (1977).

We have set forth the statutes delegating legislative police powers to the Governor in times of an emergency. Specifically, RCW 43.06.220(9) grants the Governor power to prohibit activities he or she feels are necessary to protect the life, health or property of the general public. There is no doubt that the restrictions imposed by the Governor were inherently within her police power. In fact, appellants present no argument countering the fact that the Governor imposed the restrictions to protect the

public. The question narrows, therefore, to whether the restrictions imposed by the Governor were a valid exercise of police powers.

[5] The United States Supreme Court in Goldblatt v. Hempstead, supra, enunciated the vague standard applicable in determining the validity of a police power regulation.

> Except for the substitution of the familiar standard of "reasonableness," this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in Lawton v. Steele, 152 U.S. 133, 137 (1894), is still valid today:
>
> > "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."
>
> Even this rule is not applied with strict precision, for this Court has often said that "debatable questions as to reasonableness are not for the courts but for the legislature . . . ." E.g., Sproles v. Binford, 286 U.S. 374, 388 81932).

369 U.S. at 594-95.

This court has also enunciated a test to be applied in determining the reasonableness of a regulation adopted pursuant to the police power. The test is clearly set forth in Petstel, Inc. v. County of King, 77 Wn.2d 144, 154-55, 459 P.2d 937 (1969):

> First, any legislation under the police power must be reasonably necessary in the interest of the public health, safety, morals, and the general welfare. E.g., Reesman v. State, 74 Wn.2d 646, 445 P.2d 1004 (1968); State v. Spino, [61 Wn.2d 246, 377 P.2d 868 (1963)]; Clark v. Dwyer, 56 Wn.2d 425, 353 P.2d 941 (1960); Remington Arms Co. v. Skaggs, [55 Wn.2d 1, 345 P.2d 1085 (1959)]. In applying this test, courts utilize the presumption mentioned earlier--if a state of facts justifying the legislation can be conceived to exist, the existence of these facts will be presumed. This presumption severely limits judicial review at this stage, because in order to fail this first test there must be no reasonably conceivable state of facts creating a public need for regulation.
>
> The second general test requires that even though the activity in question be subject to police power regulation, the legislation must be substantially related to the evil sought to be cured. (This evil may have been presumed under the first test; so

that discussions of these two tests in opinions are usually interrelated.) See e.g., State ex rel. Rhodes v. Cook, 72 Wn.2d 436, 433 P.2d 677 (1967); Treffry v. Taylor, 67 Wn.2d 487, 408 P.2d 269 (1965).

The third test is really an offshoot of the second with some equal protection overtones. It requires that the classes of businesses, products or persons regulated, or the various classes established within the legislation be reasonably related to the legitimate object of the legislation. See County of Spokane v. Valu-Mart, Inc., 69 Wn.2d 712, 419 P.2d 993 (1966).

The fourth test is also a specialized application of the second which is peculiar to rate regulation. It requires that the rates set be reasonable, and not unnecessarily prohibitory and confiscatory. See People v. Albrecht, 145 Colo. 202, 358 P.2d 4 (1960).

These four tests represent the limits of judicial review of legislative enactments under the police power. The courts will not examine the motives of the legislative body; they will not require factual justification for the legislation if it can reasonably be presumed; and the courts will not weigh the wisdom of the particular legislation enacted.

Furthermore, an exercise of police power is presumed constitutionally valid. E.g., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529, 3 L. Ed. 2d 1003, 79 S. Ct. 962 (1959); Salsburg v. Maryland, 346 U.S. 545, 553, 98 L. Ed. 281, 74 S. Ct. 280 (1954). The exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it. E.g., Goldblatt v. Hempstead, supra; United States v. Carolene Prods. Co., 304 U.S. 144, 154, 82 L. Ed. 1234, 58 S. Ct. 778 (1938).

In applying these tests, we find that the restrictions imposed upon appellants' land by the Governor were valid exercises of her police power. Thus, appellants' complaint was properly dismissed.

Our conclusion that the restrictions imposed by the Governor were proper exercises of her police power is relevant to appellants' final contention that they are entitled to damages under 42 U.S.C. §1983 because their federal constitutional rights were infringed. Specifically, appellants contend that the restrictions imposed by the Governor deprived them of property rights without due process of law.

[6] The general rule is that the State is not deprived of the power to enact regulations reasonable in character by the Fourteenth Amendment, and a restriction which is a valid exercise of the police power does not violate the due process clause of the federal constitution. See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 300, 69 L. Ed. 2d 1,

101 S. Ct. 2352, 2372 (1981); Carpenters Local 213 v. Ritter's Cafe, 315 U.S. 722, 86 L. Ed. 1143, 62 S. Ct. 807, reh'g denied, 316 U.S. 708 (1942); Terrace v. Thompson, 263 U.S. 197, 217, 68 L. Ed. 255, 44 S. Ct. 15 (1923); Pacific Gas & Elec. Co. v. Police Court, 251 U.S. 22, 25, 64 L. Ed. 112, 40 S. Ct. 79 (1919); Barbier v. Connolly, 113 U.S. 27, 31, 28 L. Ed. 923, 5 S. Ct. 357 (1884). The United States Supreme Court has, in addition, required that governmental regulations shall be accomplished by methods consistent with due process and thus the due process clause is a limitation upon an arbitrary or unreasonable exercise of the power. See, e.g., Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 79 L. Ed. 949, 55 S. Ct. 486 (1935); Nebbia v. New York, 291 U.S. 502, 78 L. Ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469 (1934).

Appellants assert that police power exercised herein was unreasonable and thus violated their due process rights. We cannot agree under the circumstances of this case. We previously discussed the judicial test for reasonableness of a regulation adopted under the state's police power and concluded that the restrictions herein met those standards. Accordingly, the restrictions did not deprive appellants of any property rights without due process of law and appellants' complaint was properly dismissed. We thus need not reach the State's contentions that the Governor was immune from liability under 42 U.S.C. §1983 pursuant to Scheuer v. Rhodes, 416 U.S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); Wood v. Strickland, 420 U.S. 308, 43 L. Ed. 2d 214, 95 S. Ct. 992, reh'g

denied, 421 U.S. 921 (1975); Procunier v. Navarette, 434 U.S. 555, 55 L. Ed. 2d 24, 98 S. Ct. 855 (1978); and Hocker v. Woody, 95 Wn.2d 822, 631 P.2d 372 (1981).

In sum, it is obvious that Washington is in the unique and unenviable position of having an active volcano in its midst. The unpredictable volcano presents continuing problems as indicated by Governor Spellman's, Governor Ray's successor, involvement in monitoring the restricted areas around a still active volcano. A cause of action for damages such as that brought by appellants is not the proper mode to challenge the Governor's actions. If it were, a suit could be brought by persons disagreeing with the decisions made contending that Cougar should have been excluded from the restricted zone and other suits contending, at the same time, that Cougar should have been included in the restricted zone earlier. Each damage suit would collaterally attack the Governor's decision and the proper location of the restricted zones would be determined by different courts in different forums.

We affirm the trial court's dismissal of appellants' complaint.

BRACHTENBACH, C.J., and ROSELLINI, STAFFORD, UTTER, DOLLIVER, WILLIAMS, DORE, and PEARSON, JJ., concur.

APPENDIX B

Survey of Emergency Legislation of the 50 States

The emergency legislation is generally classified under either civil defense or some other separate emergency or disaster legislation.

Only two states appear to have no general emergency-type statutes--Mississippi and Nebraska. Both have a reference to a 60-day waiver of housing regulations, but no general powers provisions.[1]

Emergency legislation can be categorized into six categories, seven including Washington.

The first is no time limitation language at all. Thirteen states belong

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[1] Miss. Code § 43-41-301; Neb. Rev. Stat. § 81-829.69.

to this group--Alabama,[2] California,[3] Florida,[4] Hawaii,[5] Massachusetts,[6] Missouri,[7] Nevada,[8] New Hampshire,[9] New

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[2]Ala. Code § 31-9-6, 8, 13-15.

[3]Cal. Gov't Code § 14120.

[4]Fla. Stat. § 14.021.022.

[5]Haw. Rev. Stat. § 125-2.

[6]Mass. Gen. Laws. 33 App. § 13-5, 8.

[7]Mo. Stat. § 44.022, 100.

[8]Nev. Rev. Stat. § 414.070, 416.030, .070.

[9]N. H. Rev. Stat. § 107:6, 8.

Mexico,[10] Pennsylvania,[11] South Dakota,[12] Virginia,[13] Wyoming.[14] The second group, which is the largest by two, involves general language to the effect that the extraordinary powers are good "so long as the emergency continues" or some other similar language, with the governor apparently retaining absolute discretion to determine the termination. Language varies from state to state. This group numbers 15 (30 percent): Alaska,[15]

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[10]N. M. Stat. § 12-10-4.

[11]Pa. Cons. Stat. 71 § 689.4; 51 508 (calling out militia during emergencies).

[12]S. D. Code Laws § 33-15-8.

[13]Va. Code § 44-146.17, .28.

[14]Wyo. Stat. § 19-5-104.

[15]Alaska Stat. § 26.20.40 "[D]uring that period of time that the state of emergency exists or continues . . . ."

Connecticut,[16] Delaware,[17] Georgia,[18] Kentucky,[19] Maine,[20] North Carolina,[21]

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[16]Conn. Gen. Stat. § 28-9a "Upon such proclamation the following provision of this section and the provisions of section 28-11 shall immediately become effective and shall continue in effect until the governor proclaims the end of the civil preparedness emergency."

[17]Del. Code 20 § 3125(d) "The state of emergency shall cease to exist upon the issuance of a proclamation of the governor declaring its termination."

[18]Ga. Code § 40-213 "[D]uring a period of time and in such manner . . . as in the judgment of the governor shall best provide and safeguard for protection of persons and property . . . ."

[19]Ky. Rev. Stat. § 38.409 "[T]he governor shall have and may exercise for such period as such state of emergency exists or continues, the following emergency powers . . . ."

[20]Me. Rev. Stat. 37-A § 57 "Whenever the Governor is satisfied that an emergency no longer exists he shall terminate the proclamation."

[21]N. C. Gen. Stat. § 166-6.1 "During such period as the state of disaster exists or continues . . . ."; 147-33.2 [F]rom time to time during the existing state of war . . . ."

Ohio,[22] Oklahoma,[23] Oregon,[24] Rhode Island,[25] Tennessee,[26] Utah,[27] Vermont,[28]

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[22]Ohio Rev. Code § 1701.01 Definitions: "[S]uch an emergency shall continue until terminated by proclamation of the governor.

[23]Okla. Stat. 63 § 683.8 "Any such emergency shall terminate upon the proclamation of termination . . . ."

[24]Or. Rev. Stat. § 401.520 "Upon finding that the emergency has ceased to exist the emergency disaster area shall likewise be dissolved by proclamation of the Governor.

[25]R. I. Gen Laws § 30-15-14 "[F]or such period as such state of emergency exists or continues . . . ."; 43-3-30 "When it shall be determined by the governor that the time of emergency . . . has ceased . . . ."

[26]Tenn. Code § 58-2-114 "[F]or such period as such state of emergency exists or continues . . . ."

[27]Utah Code § 63-5-3 "Whenever he deems it expedient the Governor may by proclamation declare the emergency terminated."

[28]Vt. Stat. 20 § 9 "[F]or such period as he shall find the emergency exists . . . ."

West Virginia.[29] Ironically, Oregon comes the closest to the Washington statute. The Oregon governor shall terminate the proclamation when the emergency no longer exists. The difference is between the terms "must" (mandatory) and "shall" (permissive). These first two groups can be considered as one since in substance both have no time limitation.

The third group involves the only standard language apparently drawn from a common source:

> The state of disaster shall continue until the governor finds that the threat of danger has passed, the disaster has been dealt with to the extent that emergency conditions no longer exist, and terminates the state of disaster emergency by executive order or proclamation; provided, however, that no state of disaster emergency may

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[29] W. Va. Code § 15-5-6 "Any such emergency . . . shall terminate upon proclamation of the termination . . . . So long as such state of emergency exists . . . ."

> continue for longer than thirty (30) days unless renewed by the governor. The general assembly, by joint resolution, may terminate a state of disaster emergency at any time. Thereupon the governor shall issue an executive order or proclamation ending the state of disaster emergency.[30]

This group numbers seven (14 percent): Arkansas, Colorado, Idaho, Indiana,[31] Louisana, Maryland, North Dakota and Texas.

The next category includes the several states with variations on the above standard form and those with some other definite time limits. The Idaho statute varies in that it expressly states that the second term is only 30

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[30]Ark. Stat. § 11-1941; Colo. Rev. Stat (1973) § 28-2-104; Ind. St. § 10-4-7; La. Rev. Stat. 29 § 705; Md. Code 16A § 6A; N.D. Cent. Code § 37-17.05; Tex. Civ. Stat. Art. 688-7 section 5.

[31]Indiana has a separate statute for energy emergencies which allows only two 60-day periods without legislative approval. Ind. St. § 10-4-7.1.

days. Apparently that is implied by "renewal" in the standard form.[32] Kansas allows only 15 days unless ratified by resolution of the legislature except the financial council can extend for 30 days beyond the 15.[33] New York statute is similar.[34] Michigan holds the first term to 14 days, then the governor must have legislative approval for a specific number of days beyond that.[35] Iowa does not really follow the standard form, but has a term limit of 30 days which can be extended in writing.[36] It is not clear how long the extension can be. South Carolina does not allow the state of

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[32]Idaho Code § 46-1008(2).

[33]Kan. Stat. § 48-924, 925.

[34]N.Y. Exec. Law § 29-a (referring to suspension of other laws, 30-day limit subject to 30-day extension, legislature may terminate at any time.

[35]Mich. Stat. § 4.824 (13).

[36]Iowa Code § 29C.6.1.

emergency to continue for more than 15 days without the consent of the legislature.[37]

In the next category, some form of legislative involvement or approval in the declaration of emergency process is required. This group numbers four (eight

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[37]S.C. Code § 25-1-440.

percent): Arizona,[38] Montana,[39]

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[38]Ariz. Rev. Stat. § 26-303 If legislature is not in session state of war emergency shall terminate in 24 hours unless special session of legislature called; otherwise, "[T]he powers granted the governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the governor or by concurrent resolution of the legislature declaring it at an end.

[39]Mont. Code § 10-3-303 "(3) A state of disaster may not continue for longer than 30 days unless continuing conditions of the state of disaster exist, which shall be determined by a declaration of a major disaster by the President of the United States or by the declaration of the legislature by joint resolution of continuing conditions of the state of disaster.

"(4) The governor shall terminate a state of emergency or disaster when: (a) the emergency or disaster has passed; (b) the emergency or disaster has been dealt with to the extent that emergency or disaster conditions no longer exist; or (c) at any time the legislature terminates the state of emergency or disaster by joint resolution."

Minnesota,[40] Wisconsin.[41]

The last category is Illinois, which has a single 30-day limit on the term of emergency.[42] In New Jersey the period of emergency terminates in six months.[43]

This leaves the comparison with the Washington State statutes, RCW 43.06.010 through RCW 43.06.340, particularly RCW 43.06.210. Excepting those 18 states with a definite time limit of some sort, Washington has the only mandatory proviso to terminate an emergency proclamation after the disaster is over. This indicates the uniqueness of the

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[40]Minn. Stat. 3A § 12.31 Subd. 2 "The governor may declare a peacetime emergency . . . . It shall not be continued for a period of more than five days unless extended by resolution of the executive council up to 30 days.

[41]Wis. Stat. § 166.03 (30-day limit for natural disaster unless extended by the legislature).

[42]Ill. Stat. § 127-Paragraph 1108.

[43]N.J. Stat. App. A:9-51.1.

Washington statute which when combined with the uniqueness of the volcanic eruption, definitely brings forth a case of first impression.

The examination of the other states indicates that time limits are not uncommon. The law review article comments: Constitutional and Statutory Bases of Governor's Emergency Powers, 64 Mich. L. Rev. 291 (1966), when it refers to limitations on governor's emergency powers, refers to restrictions on the powers themselves while the emergency exists; it does not refer to the time limitations.

Certain state emergency statutes expressly assign the governor the task of determining when the emergency no longer exists; this is not the case in Washington. Also, certain states involve the legislature in the declaration of emergency process; Washington does not.

In summary, Washington's emergency statutes stand alone among the statutes of 50 states with its mandatory proviso (RCW 43.06.210) requiring the governor of the state to terminate the emergency proclamation when order has been restored in the area affected.

NO. 82-403

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1982

COUGAR BUSINESS OWNERS ASSOCIATION, et al.,

Petitioners,

v.

STATE OF WASHINGTON; DIXIE LEE RAY, Governor; JOHN DOE ONE and JOHN DOE TWO,

Respondents.

On Certiorari from the Supreme Court

of the State of Washington

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

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---

PETITION FOR CERTIORARI

I. FACTS AND PRIOR PROCEEDINGS

Petitioners, property owners in the town of Cougar, Washington, seek damages for economic losses suffered to their

businesses after former Governor Dixy Lee Ray included their town in a restricted zone around Mt. St. Helens during its eruptive activity between April-October, 1980.

A summary of the sequence of events which are subject matter of this law suit appears in the Washington State Supreme Court's opinion in this case. Cougar Business Owners Ass'n v. State, 97 Wn.2d 466, ___ P.2d ___ (1982); See Petition for Certiorari, Appendix A. At the time of the challenged decisions the nature and extent of the threat posed by Mt. St. Helens was largely unknown. Id. 97 Wn.2d at 469-471; Petition, Appendix at A-4--A-5.

Petitioners brought suit for money damages against the State of Washington, Governor Ray and two unnamed individuals

after the restrictions had been lifted. The Washington Supreme Court upheld a summary judgment granted in favor of defendants. The court held that the Governor's actions were authorized by statute, entirely discretionary and, therefore, immune from suit. The court also ruled that the Governor's actions failed to constitute a taking of property without compensation and that no liability for her actions could be established under 42 U.S.C. § 1983.

II. SUMMARY OF PETITIONERS' ARGUMENTS

Arguments for granting certiorari rests heavily upon claims that the Washington court has erroneously interpreted State law. Petitioners claim that state statutes restrict the exercise of the Governor's emergency

powers to situations where events of a specified nature have actually resulted in some property damage or loss of life. They further claim the statutes require an end to emergency measures sooner than it occurred in the case.

The state court refused to accept this narrow view of when emergency powers may be exercised, pointing out that under this interpretation:

> The Governor would have had no power to act before the actual eruption to save lives or property. In other words, nothing of a preventive nature could have been done. Such a contention is contrary to the legislative intent of the statutes on which the Governor's actions were based.

97 Wn.2d at 475; Petition, Appendix at A-14.

Petitioners claim this is wrong and has resulted in a denial of their rights to due process guaranteed by the federal

Constitution. This interpretation is said to permit arbitrary actions by the Governor with no recourse for persons damaged thereby. The state court noted that an action in mandamus would be available to challenge unlawful exercise of executive emergency powers, but the Cougar Business Owners failed to make use of the remedy. Petitioners now claim it would have been futile to bring such an action, and argue they have been effectively denied their right to have the Governor's actions reviewed. Petition at 19.

III. ARGUMENTS AGAINST GRANTING CERTIORARI

A. The state court's decision did not address heretofore undecided issues of federal law and was not in conflict with applicable decisions of other courts.

Petitioners seek discretionary review of the denial of their right to

recover damages for Governor Ray's actions. U.S. Sup. Ct. R. 17 provides:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> . . .
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with a decision of another state court of last result or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way in conflict with applicable decisions of

this Court.

. . .

The United States Supreme Court has long recognized the broad authority of a chief executive to take necessary measures in times of emergency. Because the precise nature of an impending emergency cannot be predicted in advance and because effective response must depend upon quick action with less than complete information, the Washington court was correct in refusing to define the executive emergency powers narrowly. This decision was wholly in keeping with existing Supreme Court authority.

As stated in Sterling v. Constantin, 287 U.S. 378, 399-400 (1932):

> By virtue of his duty to "cause the laws to be faithfully executed," the Executive is appropriately

vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive. That construction, this Court has said, in speaking of the power constitutionally conferred by the Congress upon the President to call the militia to actual service, "necessarily results in the nature of the power itself, and from the manifest object contemplated." The power "is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union." (Citing authority.) Similar effect, for corresponding reasons, is ascribed to the exercise by the Governor of a state of his discretion in calling out its military forces to suppress insurrection and disorder. (Citing authorities.) The nature of the power also necessarily implies that there is permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions. the power itself would be useless. Such

> measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace. [Emphasis supplied.]

See also Moyer v. Peabody, 212 U.S. 78, 85 (1909). Moyer and Sterling continue to be viable authority for the exercise of a Governor's emergency powers. See Valdez v. Black, 446 F.2d 1071, 1076-1077 (10th Cir. 1971).

Petitioners have cited no cases in which the position of another state court of last resort or a federal court of appeals is in conflict with the Washington decision. Rather, courts and legislatures have generally recognized the need to provide for a chief executive's prompt, effective response to emergencies of all kinds:

> In times of natural catastrophy or civil disorder, immediate and decisive action by some component of state government is essential. The legislative police power can of course be exercised to deal with crises affecting the public health, safety, and welfare. In practice, however, the ravages of nature and exigencies of rioting, labor strife, and civil rights emergencies usually necessitate prompt governmental response. Since the executive is inherently better able than the legislature to provide this immediate response, the state chief executives have frequently been given substantial discretionary authority in the form of emergency powers to deal with anticipated crises. Consequently, when public emergencies arise, the center of governmental response is usually the Governor's office.

Comment, Constitutional and Statutory Bases of Governor's Emergency Powers, 64 Mich. L. Rev. 290 (1956).

For example, in Boyd

v. Commonwealth, 215 S.E.2d 915 (Va. 1975), the court was unwilling to restrictively interpret a similar state law. In Boyd, as in this case, the disaster was not a single incident but rather a temporary condition which existed over a period of time.

The United States Supreme Court should not take on the task of defining or limiting a state chief executive's emergency powers and circumstances justifying use of these powers. There is no indication of substantial controversy among jurisdictions on these issues. Nor is there any indication that the various state statutes have yet been subject to judicial interpretation in the applicable state courts. Absent this showing, especially since no important issues of federal law are

presented, certiorari should not be granted.

B. Petitioners' due process rights have not been violated by the Governor's restricting public access to the town of Cougar.

The Petition for Certiorari states at page 15:

> The governor's action, however, was an improper exercise of police power and violated Petitioners' due process rights protected by federal and state constitutions.

It is not altogether clear whether petitioners are claiming that their rights to "procedural" or "substantive" due process are infringed. Although the Constitution protects individuals right to own, use, and enjoy property, the Supreme Court has long recognized that government can regulate or restrict the use of private property in its exercise of its police power without requiring

payment of compensation. The analysis applied is whether the exercise of police power is "reasonable". Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 300 (1981); Goldblatt v. Hempstead, 369 U.S. 590 (1962); Euclid v. Ambler Realty, 272 U.S. 365 (1926).

In the instant case, petitioners' economic interest in keeping their businesses open to the public must give way to the important interest of the government in emergency regulation to protect against loss of life and property in a potential disaster situation. In view of the fact the Governor exercised her best judgment after consultation with experts and that no one could predict when or what Mt. St. Helens would do, the Governor's

actions were reasonable. Cougar Business Owners Ass'n v. State, 97 Wn.2d at 469-470; Petition, Appendix at A-4--A-6. Furthermore, the Governor's affidavit describing the actions taken and the reasons therefore was uncontroverted by petitioners.

Petitioners have not, and cannot, make the requisite showing that the Washington court's decision is in conflict with other authorities.

C. Petitioners have not been denied their rights to procedural due process.

Petitioners claim that the Washington court's decision leaves persons aggrieved by a Governor's exercise of emergency powers without remedy. The legislative history of the Emergency Powers Act makes clear that the remedy for citizens aggrieved by a Governor's declaration of an emergency

is an action in the State Supreme Court for a writ of mandamus of prohibition. 1969 Sen.J. 41st Legis. Wash. at 1066.

Petitioners never attempted to have any of the Governor's decisions concerning Cougar reviewed under this procedure. Cougar Business Owners Ass'n v. State, 97 Wn.2d at 471; Petition, Appendix at A-6. They argue instead that such action would have been futile because the Governor's decision to call out the state militia is by statute, "final, incontrovertible and unimpeachable." In fact, there is no reason to believe the Washington Court would consider itself powerless to prevent truly arbitrary and unreasonable actions of a chief executive.

The United States Supreme Court should not pass upon whether a remedy

would or would not have been effective when the remedy was never used by petitioners and, in fact, petitioners have left unchallenged the Governor's affidavit establishing the necessity and reasonableness of her acts.

Review of the appended decision will reveal that petitioners failed to raise federal Constitutional issues for the state court concerning the adequacy of the mandamus remedy. Thus, this issue should not be addressed by this Court. Shelley v. Kraemer, 334 U.S. 1 (1948).

IV. SUMMARY

The Petition for Certiorari should be denied. Petitioners are seeking review of issues of state law touching important powers of the state chief

executive. There has been no showing that the Washington court's decision is in conflict with Supreme Court or other authority. It is not violative of due process to take reasonable steps to protect life and property threatened by a natural disaster. The reasonableness of measures prescribed by Governor Ray was established in her affidavit and was unchallenged by petitioners.

Federal law does not entitle petitioner to money damages under the facts of this case when the highest state court has eld no such remedy available under state law. This does not mean persons are left with no recourse against future arbitrary and unreasonable exercise of emergency powers. Rights to procedural due process are protected by the

availability of a writ of mandamus or prohibition in the courts, a remedy never pursued by petitioners in this case.

DATED this 30th day of September, 1982.

Respectfully submitted,

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